

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE: NEW ENGLAND COMPOUNDING)
PHARMACY CASES LITIGATION) MDL NO. 13-02419-RWZ
)
)
)

BEFORE: THE HONORABLE JENNIFER C. BOAL

MOTION HEARING

September 9, 2015

3:22 p.m.

John J. Moakley United States Courthouse
Courtroom No. 14
One Courthouse Way
Boston, Massachusetts 02210

Kelly Mortellite, RMR, CRR
Official Court Reporter
John J. Moakley United States Courthouse
One Courthouse Way, Room 5200
Boston, Massachusetts 02210
mortellite@gmail.com

1 APPEARANCES:

2 For the Plaintiffs:

3 On behalf of Plaintiffs' Steering Committee:

Kristen A. Johnson, Esq.

4 Edward Notargiacomo, Esq.

Hagens Berman Sobol Shapiro LLP

5 55 Cambridge Pkwy

Suite 301

6 Cambridge, MA 02142

617-482-3700

7 kristen@hbsslaw.com

8 Benjamin A. Gastel, Esq.

Branstetter, Stranch & Jennings, PLLC

9 227 Second Avenue, N

4th Floor

10 Nashville, TN 37201

615-254-8801

11 beng@branstetterlaw.com

12 For the Defendants:

13 On Behalf of Barry J. Cadden:

14 Michelle Peirce, Esq.

Donoghue Barrett & Singal

15 One Beacon Street

Suite 1320

16 Boston, MA 02108

617.720.5090

17 mpeirce@dbslawfirm.com

18 On behalf of Douglas Conigliaro:

Christopher R. O'Hara, Esq.

19 Todd & Weld LLP

27th Floor

20 One Federal Street

Boston, MA 02110

21 617-720-2626

cohara@toddweld.com

22
23
24
25 (Continued on next page)

1 APPEARANCES: (Continued)

2 On behalf of Medical Sales Management:

3 Daniel M. Rabinovitz, Esq.

4 Greenberg Traurig LLP

5 One International Place

6 Boston, MA 02110

7 617-310-6000

8 rabinovitzd@gtlaw.com

9 On behalf of the Saint Thomas Entities:

10 Chris J. Tardio, Esq.

11 Matthew H. Cline, Esq.

12 Gideon, Cooper & Essary, PLC

13 315 Deaderick St

14 Suite 1100

15 Nashville, TN 37238

16 615-254-0400

17 chris@gideoncooper.com

18 matt@gideoncooper.com

19 On behalf of Pain Medicine Specialists P.A.:

20 Gregory K. Kirby, Esq.

21 Pessin Katz Law, P.A.

22 901 Dulaney Valley Rd

23 Suite 400

24 Towson, MD 21204

25 410-938-8800

gkirby@pklaw.com

On behalf of Saint Thomas West Hospital:

Adam T. Schramek, Esq.

Marcy Greer, Esq.

Fulbright & Jaworski LLP

98 San Jacinto Boulevard

Suite 1100

Austin, TX

(512) 536-5232

adam.schramek@nortonrosefulbright.com

mgreer@adjtlaw.com

(Continued on next page)

1 APPEARANCES: (Continued)

2 George P. Varghese, AUSA
3 Amanda Strachan, AUSA
4 United States Attorney's Office
5 John Joseph Moakley Federal Courthouse
6 1 Courthouse Way
7 Suite 9200
8 Boston, MA 02210
9 617-748-3237
10 george.varghese@usdoj.gov
11 amanda.strachan@usdoj.gov
12

13 Via teleconference:

14 On behalf of Tim I. Chowdhury, M.D.:
15 Bartholomew T. Freeze, Esq.
16 Freund, Freeze & Arnold
17 65 East State Street
18 Capitol Square Office Building
19 Suite 800
20 Columbus, OH 43215
21 (614) 827-7300
22 bfreeze@ffalaw.com
23

24 On behalf of Saint Thomas West Hospital:
25 Eric J. Hoffman, Esq.
Fulbright & Jaworski, LLP
98 San Jacinto Blvd
Suite 1100
Austin, TX 78701
512-536-2450
eric.hoffman@nortonrosefulbright.com

P R O C E E D I N G S

(The following proceedings were held in open court before The Honorable Jennifer C. Boal, United States Magistrate Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Courtroom 14, Boston, Massachusetts, on Wednesday, September 9, 2015.)

THE CLERK: This is Steve York, Judge Boal's clerk. Before we get started, I'd ask the parties on the phone to please identify themselves.

MR. HOFFMAN: Eric Hoffman for Saint Thomas Entities.

THE CLERK: Anyone else? Can counsel on the phone please identify themselves for the record.

MR. FREEZE: Bartholomew Freeze for Dr. Tim Chowdhury.

THE CLERK: Anyone else? All right. If you guys don't mind holding on, we'll get started in a few minutes.

(Judge Boal enters)

THE CLERK: Today is September 9, 2015. We're on the record in the matter of New England Compounding Pharmacy, Incorporated, Case Number 13-MD-02419.

Will counsel in the courtroom please identify themselves for the record, followed by counsel on the phone.

MR. O'HARA: Good afternoon, your Honor. Christopher O'Hara on behalf of Doug and Carla Conigliaro, and I'm from Todd & Weld.

1 MR. RABINOVITZ: Dan Rabinovitz on behalf of Greg
2 Conigliaro. Good afternoon, your Honor.

3 MS. PEIRCE: Good afternoon, your Honor. Michelle
4 Peirce on behalf of Barry and Lisa Cadden.

5 MR. SCHRAMEK: Good afternoon, your Honor. Adam
6 Schramek and Marcy Greer on behalf of the Saint Thomas
7 Entities, Saint Thomas Hospital, Saint Thomas Health and Saint
8 Thomas Network.

9 MR. TARDIO: Good afternoon, your Honor. Chris Tardio
03:47 10 for the Tennessee clinic defendants.

11 MR. CLINE: Good afternoon, your Honor. Matt Cline
12 for Tennessee clinic defendants.

13 MR. VARGHESE: Good afternoon, your Honor. George
14 Varghese for the United States.

15 MS. STRACHAN: Good afternoon, your Honor. Amanda
16 Stachan for the United States.

17 MS. JOHNSON: Good afternoon, your Honor. Kristen
18 Johnson for the Plaintiffs' Steering Committee.

19 THE COURT: And you have a new seat.

03:47 20 MS. JOHNSON: Yes.

21 MR. NOTARGIACOMO: Edward Notargiacomo for the
22 Plaintiffs' Steering Committee.

23 MR. GASTEL: Ben Gastel on behalf of the plaintiffs,
24 your Honor.

25 THE COURT: I understand there are people on the

1 phone. If you could stay seated and speak into the microphone
2 so the folks on the phone can hear us. Mr. York, is the
3 microphone set up at the stand in case anyone else --

4 THE CLERK: It should be. I'll double-check.

5 THE COURT: Thank you. And my apologies to the
6 parties. I know everyone had expressed a preference, if I had
7 to move this conference, to have it moved to tomorrow afternoon
8 after Judge Zobel's session, but I was unable to accommodate
9 that. And I did want to go forward sometime around the
03:48 10 conference tomorrow because I know everyone's under a tight
11 time deadline.

12 So this is the Tennessee defendants' motion, so I'll
13 hear from you first.

14 MR. SCHRAMEK: Your Honor, Adam Schramek for the Saint
15 Thomas Entities. Your Honor, I want to give the Court a little
16 bit of context of how we got here today because I think it is
17 very important, which is the Saint Thomas Entities did what
18 normally a defendant would do in a case, which is send
19 discovery to the various parties, to the entities and to the
03:48 20 individuals.

21 In response to our discovery requests, we had 39 that
22 went to the individuals, we of course got a pleading of the
23 Fifth Amendment privilege against self-incrimination and no
24 documents. In response to other parties' requests, such as MSN
25 and Ameridose, we got a host of objections, including the

1 objection that the materials had been seized by the government
2 and had only been returned to them in the context of criminal
3 discovery, therefore, they couldn't produce them to us because
4 it was outside the scope of civil discovery.

5 The problem we have, your Honor, is that we are on the
6 cusp of expert disclosures, and we are in the position of
7 having to put forward our defense, which will be that NECC, the
8 insiders and the affiliates were the sole proximate cause of
9 the damage to all of the patients. And in order to establish
03:49 10 that, either under Massachusetts law, sole proximate cause,
11 unforeseeable criminal conduct that breaks the chain of
12 causation, or under Tennessee law, which of course we believe
13 will apply and should apply, under the concept of comparative
14 fault.

15 And under comparative fault, I think it's very
16 important we put into our papers this time the specific jury
17 instruction for that instruction. And what it says is the jury
18 determines from all of the facts and circumstances what it
19 decides is important for the allocation of fault, who was the
03:50 20 more direct cause of the injury to the plaintiffs, whose
21 conduct was more reasonable under all the facts and
22 circumstances. And there's even a statement to the jury that
23 nobody can tell you what factor matters more than the other.

24 Under that sort of an analysis, your Honor, we believe
25 that the scope of discovery as to NECC as to how this

1 contamination occurred, as to where it occurred, in which clean
2 room did it occur, your Honor, we are at this point without one
3 witness on record who can provide that sworn testimony. We
4 tried to get it through a corporate rep. We thought, well,
5 maybe we could have the NECC trustee do it. That was denied by
6 the Court. We said, well, MSN is a company. It doesn't have a
7 right to a Fifth Amendment. Let's get a corporate rep to get
8 some of this basic information out. That was denied by the
9 Court because they say the only people they have capable will
03:51 10 invoke the Fifth. We've tried to go to the individuals now,
11 and of course there was a motion to stay on Friday for some of
12 the pharmacy techs we were trying to depose.

13 At every step of the way we have been cut off from the
14 discovery that is key and integral to our defense at trial,
15 that it's NECC, Ameridose, MSN and the insiders who solely
16 proximately caused the injury to the patients.

17 So facing all of that, we find the order, your Honor,
18 in the criminal trial, your order with respect to some of the
19 briefing that occurred there, and we find the letters that
03:51 20 essentially list all the evidence we've been looking for. I
21 just want to give the Court a couple of examples. One training
22 disc seized from NECC labeled, "FDAC's Documents Baxa ExactaMix
23 Compounder Training," our expert has told us that the Baxa pump
24 is what would have been used to compound MPA. So the question
25 is how were the NECC employees trained on that Baxa pump.

1 Right here, it's been here all along, and they're
2 refusing, the individuals refuse to produce it under the Fifth
3 Amendment, and yet we know they have it and we know that the
4 government has it, which, under the *eBay* case, if the
5 government has it, it can't incriminate you by giving it,
6 turning it over to someone who requests it because the
7 government already possesses it and it will not in any way
8 incriminate you.

9 Your Honor, there's a long list of things, including
03:52 10 compact discs labeled "Barry Cadden Sales Education." What was
11 it Mr. Cadden, the manager of NECC, the man who stood before
12 Congress and pled the Fifth Amendment, who refuses to testify
13 this proceeding and has been given that protection by this
14 Court, what has Mr. Cadden -- what was he taught about how to
15 sell his products, about how to misrepresent to customers like
16 my clients -- well, not my clients, but the solvency that I'm
17 trying to be held responsible for, to them and to other health
18 care providers. And even though we brought this motion, your
19 Honor, all the other health care providers support it because
03:53 20 they're looking for the same information. What was he taught;
21 what was he teaching his sales representatives as to how to go
22 out and to sell the quality of these preparations, the fact
23 that they were USP compliant; what were these training
24 materials?

25 The government has listed I believe 20 -- sorry, five

1 compact discs of Mr. Barry Cadden's training materials and an
2 additional training disc on other materials. It has different
3 training materials on how to sell to hospitals versus an ASC,
4 an ambulatory surgery center. It has different training
5 materials on generic training binders. They have things like a
6 handwritten note from ARL, which is the testing lab that said
7 that this MPA was not contaminated; it was a clean batch that
8 was going out to the health care providers. They have
9 handwritten thank-you notes from the head of ARL saying thank
03:54 10 you to Barry and his team for all their support over the years.

11 I went up and took ARL's deposition -- I guess down --
12 in Oklahoma City. That would have been a great document to ask
13 ARL about their relationship and why it was that ARL wasn't
14 requiring NECC to submit the number of samples they were
15 supposed to under the guidelines. ARL is another party that we
16 would point to as, if there's fault to be shared, if the jury
17 is going to look at all the facts and circumstances, ARL, which
18 as this Court knows is one of the settling parties, is one of
19 those parties. And here is documentary evidence that is in the
03:54 20 possession of the individuals that's highly relevant to that
21 long-term relationship and other ARL testing results, ARL
22 testing protocols. We actually have testimony listed in here
23 from ARL that's been provided, sworn testimony, and that's been
24 provided to the individuals who review in connection with the
25 criminal proceeding.

1 Your Honor, NECC and its pharmacists and its owners,
2 its directors, they are before this particular District Court
3 for two reasons. One is because they've been alleged to have
4 committed a crime. The second is because the patients who were
5 injured are asking for compensation. The same material, the
6 same facts, the same factual predicate that is driving the
7 criminal case is the basis for the defense in the civil case by
8 the Saint Thomas Entities and the other health providers.

9 So the question becomes, you know, in our view, well,
03:55 10 relevance. Clearly, we've broken it down into four categories
11 of documents. We think, one, we have the actual business
12 records that were seized that would have been subject to
13 discovery like normal business records but for the seizure.
14 The act of seizing them can't have changed their
15 discoverability. Those, as well as the photos that were taken
16 during the seizure, these are pictures of the facility.
17 There's nothing secret or protective against those.

18 Second is third-party records. As I mentioned, ARL,
19 there are some from the FDA. There are various third parties
03:56 20 that participated to provide their communications with the
21 sales agents and NECC. The third is witness statements and
22 investigatory notes. And the fourth are the grand jury
23 materials.

24 And your Honor, I believe the reason we attached all
25 the letters to A, B, C and D to our first motion is because

1 it's hard to imagine anyone reading those letters and not
2 going, "That is the treasure trove of evidence that the
3 defendants have been fighting for the past year to try to get
4 and so far has been blocked at every stop." So when we saw
5 these letters, we absolutely sent a new request to the
6 individuals and said, "Under the *eBay* case, you have no Fifth
7 Amendment privilege to not produce what the government already
8 has. Give us the documents we've been asking for."

9 And I filed today, just because I realized the record
03:56 10 wasn't complete, the document request for the individuals that
11 we had previously sent so that the Court can see we sent 39
12 categories of documents and got zilch. I think a great example
13 of what we're up against is the fact that we've been trying to
14 seek the training videos. These are, you know, how to sell
15 NECC product that have been produced and given to their sales
16 force. And we tried to get it, and the response is, "Well,
17 some of those were seized by the government and may not be
18 subject to the protective order, therefore, we can't produce
19 it." There's always an excuse. If there's one thing that is
03:57 20 consistent from the individuals and the affiliated companies is
21 they will produce nothing absent a court order.

22 We literally have gotten almost zero from them. This
23 morning, your Honor, I took the deposition before this hearing
24 of Steve Higgins. He's with GDC Properties, the management
25 company. He pled the Fifth to every question. So if I don't

1 have a document, I don't have evidence in this case. And these
2 are the documents, the key documents that we absolutely,
3 absolutely need.

4 I would like to address a couple of the legal issues
5 that were raised. One of course -- and I'd like to put in the
6 context of the U.S. has filed its motion to intervene. We're
7 here today to respond to their arguments as to the
8 discoverability of these documents.

9 THE COURT: And that's all I'm considering at this
03:58 10 time.

11 MR. SCHRAMEK: Okay. So we'll file our response to
12 the other. But with respect to that argument, one case they
13 pointed to and relied heavily on to this Court was the *U.S. v.*
14 *Moussaoui* case, which of course was the 9/11 bomber case. I
15 think it is very telling that -- what that case had to do with
16 was which court was going to make the decision. And the
17 criminal court, which I believe was in Virginia, was saying,
18 "Well, the Southern District of New York, it's the civil court
19 where the civil cases are pending. I'm going to let it make
03:58 20 the decision." And it went up on appeal on a very strange kind
21 of procedural basis. And ultimately, at the end of the opinion
22 what the Court said in *Moussaoui* was what you've got to do is
23 you first have to go to the criminal court, ask the criminal
24 court to turn this grand jury -- these are grand jury
25 materials -- over to the Southern District of New York under

1 6(e), I believe it is, of the federal criminal rules, and then
2 the civil court can determine the appropriate discoverability
3 of those documents.

4 In other words, *Moussaoui* had to do with something we
5 don't have to worry about today because this court, the
6 District of Massachusetts, is sitting in both the civil and
7 criminal trail. So *Moussaoui* is just about irrelevant for the
8 purposes of why we're here because the Court ended by saying,
9 "Get the documents in the right place and then come back to us
03:59 10 later." Your Honor, what *Moussaoui* did do -- and also the case
11 of *U.S. v. Bulger* did, was lay out the Supreme Court standard
12 for being able to get grand jury materials.

13 And the standard is a three-prong test. One is you
14 have to show that there's a need for the materials to avoid
15 injustice in another proceeding. Your Honor, my clients are
16 trying to be -- the PSC is seeking millions of dollars from my
17 clients in a civil judgment. Your Honor, it would be unjust
18 and we believe would violate basic tenets of due process to try
19 to send us to trial without the documents we need to defend
04:00 20 ourselves. So we think one is clearly easily met here.

21 The second is the need for disclosure is greater than
22 the need for continued secrecy. Now, as the Court is aware,
23 sometimes the defendants, criminal defendants, don't even get
24 grand jury materials, right? There are certain circumstances
25 they do or they don't, *Brady*, all these other issues. But

1 here, the government has decided to give them everything,
2 and/or whatever is on the hard drive, they got. So oftentimes
3 the grand jury, secrecy of the grand jury process is -- as the
4 grand jury determines who to indict, what to do. Here, the
5 indictments issued months ago. There's no indication any more
6 are coming, and the grand jury materials are in the hands of
7 the criminal defendants.

8 So it's not, are they secret from the public. It's,
9 is there a need for disclosure in the litigation proceeding
04:01 10 that's greater than the need for secrecy from the defendants.
11 There's a protective order in place in the MDL. There's zero
12 evidence that anyone has ever violated it. Almost every
13 document produced by the defendants that has to do with patient
14 medical information, financial information, internal, it's all
15 been marked confidential. Has it ever come out in the news?
16 Are there news stories about the internal ARL operating
17 procedures? Of course not. Because, your Honor, we have --
18 all the parties have lived up to that protective order and will
19 into the future.

04:01 20 So the question on the second prong of *Moussaoui* is,
21 is there a need for disclosure greater than the need for
22 continued secrecy. And we believe in a partial disclosure of
23 civil defendants, under a protective order issued by the same
24 court in which the criminal court is pending, subject to the
25 same enforcement procedures as the criminal and civil court,

1 the answer we believe is clearly yes in this circumstance.

2 And three, the request has to be limited to the needed
3 materials. Your Honor, when we saw these letters, we had no
4 doubt we needed them. We have yet to see any argument of --
5 any sort of meaningful argument that we don't need them. All
6 we keep hearing is, "Well, it's irrelevant," and you know,
7 "Let's wait until later," and this, that and the other. Your
8 Honor, we can't imagine more relevant information, and we have
9 limited our request to the needed materials because at the end
04:02 10 of the day, as I mentioned in the beginning, the same facts at
11 issue as to whether Mr. Cadden is going to go to jail for a
12 year, ten years or the rest of his life, are the facts that
13 will determine whether NECC should have one percent of fault,
14 10 percent of fault or 100 percent of the fault. It's the same
15 facts and circumstances that the civil juries get to hear in
16 the context of determining money damages as the criminal jury
17 gets to hear in the context of liberty.

18 Your Honor, I guess the final point that I would like
19 to make is that we have been willing to work with the
04:03 20 individuals, with the government. If there is some particular
21 category the government is really concerned about, "There is an
22 ongoing investigation of some matter, and we would give you all
23 the grand jury materials but these. We're going to hold these
24 back because we're letting you know" -- we would work with them
25 and we'd be happy to limit it in some way. But as of today,

1 it's been the same light switch approach that we've had from
2 day one. It's all or nothing. And they're giving us nothing.

3 We would ask the Court to help us here to provide
4 meaningful evidence for us to develop our defenses on and
5 certainly not to force us to trial or expert disclosure without
6 the documents we need for a meaningful defense. Thank you.

7 THE COURT: Thank you. Who is going to speak on
8 behalf of the invoking defendants?

9 MR. O'HARA: There are actually two of us that need to
04:04 10 speak, your Honor.

11 THE COURT: So who is going to go first?

12 MS. PEIRCE: Did you want to hear from us, your Honor?

13 THE COURT: Actually, I know it's unusual, but if you
14 would sit --

15 MS. PEIRCE: Sitting. Sorry. Please know it's out of
16 respect.

17 In reality, your Honor, we're simply the wrong people
18 to be asking this from. We are temporarily allowed to look at
19 certain material. As your Honor knows from the criminal case,
04:04 20 it took months and months to even get the stuff downloaded. We
21 haven't even gotten through it. But the bottom line is it is
22 not ours. It's not in our custody, possession and control.
23 This is not a fight -- it's one of the few fights that
24 Mr. Cadden doesn't need to be in because he does not possess or
25 control these documents.

1 As your Honor is aware, in the old days, we used to go
2 over to the U.S. Attorney's Office when a client was indicted,
3 and we were given discovery. You go over there under the
4 watchful eye of FBI agents. You look at what you want under
5 their care. These aren't our documents. These aren't our
6 documents in the way it would typically be in the civil case.
7 We are allowed under very confined circumstances to bring these
8 to our office because they are too voluminous to have us go
9 over and sit as we did in the old days and pore through boxes
04:05 10 of materials.

11 So the bottom line is, we shouldn't be part of this
12 debate. We shouldn't be in the middle of an analysis that the
13 Supreme Court has said goes on between the requesting party and
14 the government, which, here, the clinic's completely
15 circumvented by going directly to us because the analysis is
16 between the government. So that's the first thing, your Honor,
17 is that we would like to be removed from this because they're
18 not ours to give.

19 Mr. Cadden and the other defendants may feel
04:05 20 similarly. We are under a tremendous burden to be sure we
21 don't inadvertently violate your protective order or do
22 anything else with the materials that we're allowed to look at
23 but not own or possess. To be in a position to have to begin
24 turning over things to clinics, et cetera, puts them at further
25 peril. Are they going to violate the protective order? We

1 just shouldn't be in this position when really what we should
2 be doing is showing why our clients are not guilty of the
3 crimes they're charged with, your Honor.

4 So, you know, the main point is I think this isn't --
5 it shouldn't be our battle and we shouldn't be in the middle of
6 it. At the end of the case, we're required to either return or
7 destroy the documents that we're allowed to look at. It is no
8 different right now than if we were sitting in a basement in
9 this building somewhere flipping through documents. We don't
04:06 10 have custody and control. It's not our decision or job to do
11 the balancing the Supreme Court had asked to balance the
12 secrecy interests versus their interest in having it.

13 The particularized need here I think is -- maybe I am
14 beginning to have the battle that I said isn't mine, but I do
15 want to speak to that. Mr. Schramek has gone through a host of
16 things they say are critical and they don't have access to. I
17 can't answer that completely. But most of the list he went
18 through, the documents from NECC, all of those documents, as I
19 understand it, have been put in a repository in this case, and
04:07 20 the trustee has been very forthcoming about providing them what
21 they need. So I do believe that's overstated a little bit.

22 And regardless, one thing I also want to clarify, and
23 it really gets back to this point, that these are simply not
24 our documents. Mr. Cadden hasn't had anything returned to him
25 in the criminal process. He didn't have anything to begin

1 with. What happened was, NECC was raided. As you know, the
2 government has gone to clinics, to ARL, to all these third
3 party entities and others that we may not even know, gotten
4 their documents and given us to review, not to keep or own,
5 certain selected pieces. So it's simply not the case as in the
6 eBay case, for example, that they cite that Mr. Cadden made a
7 document production and now he's simply being asked to give a
8 copy to somebody else. These aren't his to begin with, your
9 Honor.

04:08 10 I believe at that point, you know, the last piece of
11 the balancing as far as I see it again -- and then I defer to
12 the government because this is not our battle. As I've said a
13 couple of times, these aren't our documents. That point that I
14 was going to make and then I just distracted myself -- I
15 apologize, your Honor.

16 You know, in terms of the need -- there's another
17 motion kicking around now relating to the civil depositions.
18 These are the individuals who have the possibility of answering
19 some of these questions without the tremendous burden of asking
04:08 20 our clients to turn over the government's discovery in the
21 criminal case. And I think it's a much more balanced approach,
22 your Honor, to at least see if those people inside the clean
23 rooms that they want to know about who can say where the meth
24 pred was compounded, get that information from them before we
25 or the government is put in that position of turning over grand

1 jury information, financial information that is intertwined in
2 all of this material, including the e-mails, personal
3 information that they would never been entitled to, your Honor.
4 Thank you.

5 THE COURT: Thank you.

6 MR. O'HARA: Your Honor, I want to start with the
7 place where the discovery order that Judge Zobel issued
8 confines the remaining defendants to discovery that is
9 necessary only to the extent it's relevant to the prosecution,
04:09 10 defense of claims against defendants other than the estate
11 parties and the individual settling parties. That starting
12 point has been used to I think create a much broader swath of
13 discovery as we've seen from motion after motion after motion
14 from Saint Thomas. And I would respectfully suggest that that
15 has to be kept in mind in relation to what they are now seeking
16 in this particular go-round.

17 The particularized need is something which Michelle
18 has already touched upon. I want to speak specifically to the
19 overbreadth issue, if it's not structured to cover material as
04:10 20 to which a particular need for disclosure has been shown, and
21 that's from obviously the *Douglas Oil* case cited in our brief
22 with *Liberty Mutual* and the *Diamante* case.

23 In this instance, Saint Thomas Entities have lumped
24 together all of the entities and the individuals which I think
25 in this instance, number one, it's not ALR -- excuse me --

1 NECC, Ameridose, ARL, GDC, they're not here before you today.
2 This is solely about the individuals. And the reason they're
3 casting a broad net, I respectfully suggest, is when you look
4 and shine a sharper light on and focus on the requests being
5 made, it doesn't come out as the Saint Thomas Entities would
6 have it. In my case with regard to Doug and Carla Conigliaro,
7 it is unequivocally clear that the charges and indictments that
8 were brought against our clients in the criminal proceeding
9 were financial crimes.

04:11 10 There is no set of circumstances that Saint Thomas
11 Entities can articulate that suggests there's a particularized
12 need for the discovery that has been produced in this -- and
13 it's not discovery, it's Rule 6(e) disclosures -- to our
14 clients, Doug and Carla Conigliaro in the financial crimes and
15 indictments for which they have been charged. You see nowhere
16 in their response in both the main brief or in the reply brief
17 any comment that directs to why they need these materials. I
18 look at that and then I put in context the timing of when
19 they've brought this motion, which comes on the eve of yet
04:12 20 another trial deadline. The materials that they attached were
21 on record in May of 2015. They filed their motion of the
22 urgent need in August of 2015, when they know yet another trial
23 deadline is coming up.

24 I respectfully suggest the lag in time tells me that,
25 first -- I draw by way of inference that this is a delay

1 tactic, an attempt to stall these proceedings so that the
2 claims that the PSC would like to make on behalf of the victims
3 do not go forward now. It's been tactic after tactic after
4 tactic directed towards the individuals.

5 Now, I say that purposefully, and I say it for this
6 reason. When Mr. Schramek says that he has received nothing in
7 the discovery process, I respectfully disagree with him. The
8 discovery -- they have subjected the settling parties, before
9 they settled, to interrogatories, document requests and
04:13 10 requests for admissions. In each of those instances, the
11 settling parties have invoked their Fifth Amendment privilege
12 against self-incrimination, as is their right, given the
13 pending criminal charges that exist.

14 In the civil context, the Tennessee defendants and the
15 Saint Thomas Entities have more than they need in order to be
16 able to advance their cause to say that all of this is the
17 responsibility of the finger-pointing that they will do to the
18 parties that settled, and they have the advantage of being able
19 to do so only because we're not at liberty to respond to that
04:14 20 because of the criminal indictments.

21 So when they suggest to you they have no evidence,
22 they're simply not correct, and they will use every device they
23 can to put as much of that evidence in as they can. I
24 respectfully come back to Judge Zobel's order that there has to
25 be a particularized need. And when I look at Doug and Carla

1 Conigliaro and particularly requests for discovery about
2 structuring, about financial accounts, about things that are
3 all within your protective order that exists in the criminal
4 case, there is no reason that they have any particularized need
5 to access financial accounts, information that relates to the
6 charges that were brought against Doug and Carla Conigliaro.

7 I also want to point out that their attempts to raise
8 eBay overlooks the distinguishing circumstances between the
9 eBay case and these circumstances here. In the eBay case,
04:15 10 there were -- not all of the parties for whom discovery was
11 sought were under indictment. In this instance, the ones that
12 have received, been on the receiving end of the discovery are
13 all under indictment. That's one distinguishing
14 characteristic.

15 Second, as Michelle I think alluded to, these were
16 documents that were seized from the corporate entity NECC and
17 other corporate entities. These are not individual documents
18 that were produced by the individuals, and there's a material
19 distinction between that in terms of both the Fifth Amendment
04:15 20 privilege and with respect to other arguments about whether
21 it's in possession, custody or control. And respectfully, I
22 think they're conflating the fact that individual defendants
23 have a right to receive certain disclosures under Federal
24 Criminal Rule 6(e) with their attempt to suggest that Judge
25 Zobel's order permits them to get the same documents that the

1 criminal defendants have been given, and they're not the same.

2 So I would -- and when we point to the *Diamante* case
3 and others, it is crystal clear that there is not a
4 particularized need in this instance that justifies the
5 production of all of these records. Interspersed without
6 them -- and by the way, the government can speak more to this,
7 but the government has already indicated to folks that are on
8 our side of the ledger that they're still reviewing documents
9 that have been produced as to whether they're covered or not
04:16 10 covered within this, and it's not quite so easy to simply say
11 we'll just be subject to the same confidentiality order and
12 leave it at that.

13 There is very strong case law that financial documents
14 should not be subject to discovery prejudgment. It doesn't
15 relate to their asset -- excuse me -- their comparative fault
16 disclosures. It doesn't relate to their expert disclosures.
17 And respectfully, when they sought documents from us from Carla
18 and Doug Conigliaro, it made abundantly clear to us this is a
19 delay tactic to try to avoid the trial date with the PSC.

04:17 20 THE COURT: Thank you. Mr. Rabinovitz, did you want
21 to speak to this?

22 MR. RABINOVITZ: I do, your Honor, very briefly.

23 One thing I think that we can all agree on is that the
24 Tennessee parties are not entitled to the financial information
25 and not entitled to information relating to patient

1 information. And I want the Court to appreciate -- we pled
2 this in our brief, but I want to make sure that you appreciate
3 how intertwined that material is within approximately four
4 million pages of e-mails.

5 And so while the index that the Tennessee parties
6 point to may have some categories of folders that the
7 government segregated out that, for example, relate to
8 financial information, I can tell you that -- and we said this
9 again in our brief -- that that's not the only places that that
04:18 10 information is found.

11 And so literally, if this order was granted, if the
12 order was that you shall produce everything other than the
13 financial information and the patient information, it would be
14 impossible for us to do that. And it would be manually looking
15 at four million pages of documents and trying to parse out the
16 protected material, and that, in the context of defendants
17 trying to get ready for a criminal trial, not only is it
18 impossible but it's unreasonable to ask them to try. I just
19 wanted to highlight that for the Court.

04:18 20 THE COURT: Thank you. Who is going to speak on
21 behalf of the government?

22 MS. STRACHAN: I will, your Honor. Thank you.

23 Your Honor, as you know, on Friday the government
24 filed a motion to intervene with respect to two issues in this
25 litigation. I don't know if your Honor would like to hear us

1 on the motion to intervene or if you'd like --

2 THE COURT: Not at this point. I think I'll allow the
3 other parties in this civil case -- I know you had attached a
4 7.1 certificate -- just give everyone else an opportunity to
5 object on the motion to intervene issue, but I can certainly
6 hear you on the issue that is being discussed today.

7 MS. STRACHAN: Thank you. Your Honor, as many people
8 in this courtroom here today know, my colleague AUSA Varghese
9 and I have sat on the sidelines in the civil litigation. We
04:19 10 sat in the back of the courtroom for many, many months now
11 observing these proceedings, and we have not to date moved to
12 intervene. And that's been for what we view to be a very
13 important reason.

14 First of all -- and yet we came to observe because we
15 also felt that it was important for us to really follow two
16 things. Number one, the victims in our case, their pursuit of
17 compensation for the injuries that they have suffered. They're
18 victims in our criminal case, and we view their litigation here
19 and the process they all have been following here to be very
04:20 20 important. We haven't wanted to get involved.

21 Secondly, and equally importantly, we have observed
22 these proceedings in order to ensure that there is not harm to
23 the criminal case, which is obviously the foremost
24 responsibility of the U.S. Attorney's Office, and it has been
25 our hope that this parallel proceeding would not do that. We

1 realize that fact discovery is set to close just a mere three
2 weeks from when we filed our brief, and yet, we felt that we
3 were not given a choice because we now see two clear harms to
4 the criminal case, one of which will be addressed at another
5 time, and that's the depositions of potential government
6 witnesses and then the issue that we're here to address today,
7 which is the potential production of criminal discovery to
8 civil litigants.

9 Your Honor, you have our brief, which I know we just
04:21 10 filed a few days ago. There are a few points that I would like
11 to address. I'd like to highlight from the brief and also to
12 address the response that was filed earlier this week.

13 Saint Thomas Entities correctly states that the
14 government does not cite a lot of case law on this topic, and
15 that's because, your Honor, there simply is none. There is not
16 a lot of case law on this subject other than the Fourth and
17 Eleventh Circuit decisions that we cite in our brief. And I
18 submit, your Honor, that that speaks volumes in and of itself,
19 and that is because it is an extraordinary and largely
04:21 20 unprecedented request.

21 We cite a number of cases in our brief that there's no
22 First Amendment right to criminal discovery, and there are
23 plenty of cases that say that. And even in those cases, the
24 newspapers that are seeking criminal discovery are seeking
25 documents -- they're not seeking all criminal discovery.

1 They're seeking documents that were filed under seal or were
2 filed and were used when the Court exercised its Article III
3 authority to make decisions. Saint Thomas Entities refer in
4 their reply brief to this presumption of access. And yet the
5 presumption of access that they cite again are documents that
6 were submitted to the Court for the Court's use in making
7 decisions, not documents that are submitted to parties in
8 criminal litigation.

9 As the invoking defendants have said, your Honor, in
04:22 10 their brief and as we have as well, we believe they have not
11 made a showing of need for the discovery. They say they want
12 it. We understand why they want it. I think there are a lot
13 of people that would probably be interested in reading the
14 government's memoranda of interview of the witnesses that we
15 interviewed in connection with our criminal investigation. But
16 I would submit, your Honor, that this is a completely improper
17 basis for them to seek the criminal discovery. They simply
18 don't have a right to it.

19 They also say in the reply brief that was filed
04:22 20 earlier this week that they are asking simply for documents
21 that were seized by the government and then returned to NECC.
22 Your Honor, the amount of documents -- as you know, the
23 discovery of 8.8 million pages, that number has been thrown
24 around a lot both in this litigation and the criminal
25 litigation. The volume of materials that were seized from NECC

1 and has since been returned to NECC, that's about 12.5 percent
2 of the criminal discovery produced. So there are vast amounts
3 of information that were not seized from NECC and now, quote,
4 unquote, "returned" to the criminal defendants in the criminal
5 discovery.

6 THE COURT: I'm sorry. You're saying that only 12
7 percent of the material at NECC was seized, or did I
8 misunderstand you?

9 MS. STRACHAN: No. I'm sorry, your Honor. Of the 8.8
04:23 10 million pages of documents in criminal discovery, only about
11 1.8 million of those documents were documents that were seized
12 from NECC servers or in paper form.

13 THE COURT: I see.

14 MS. STRACHAN: Your Honor, the Saint Thomas
15 defendants, we submit, also misunderstands the nature of what's
16 in some of the discovery and also the nature of grand jury
17 secrecy protection. They say in their papers they're not
18 seeking grand jury materials. It sounds today like perhaps
19 they are. I think that they clearly have looked at the
04:24 20 exhibits that were filed in response to the discovery brief,
21 but the discovery brief written in the criminal case makes very
22 clear, as does your Court's order, that the criminal defendants
23 don't even have all of the grand jury materials. With respect
24 to grand jury secrecy that is afforded grand jury materials,
25 that secrecy lives on after a case is charged. We as

1 prosecutors are still required to adhere to the rule, Federal
2 Rule of Criminal Procedure 6(e). The grand jury secrecy
3 protection lives on for those documents.

4 Any documents that we received in response to grand
5 jury subpoenas are also protected by Rule 6(e), also may be
6 included within that production. So I think that it's
7 important for us to note the grand jury secrecy is alive and
8 well in that criminal discovery, and there's a very good reason
9 for that.

04:25 10 As your Honor knows, this case began with an outbreak.
11 It began with a national tragedy. Two years later we had a
12 131-count indictment. Without disclosing what happened between
13 Point A and Point B, I think everyone probably understands that
14 a lot happened. A lot of evidence was collected. There's 8.8
15 million pages of discovery. And what happened before the grand
16 jury that returned that indictment is secret for a very good
17 reason. It protects people who are charged. It protects
18 people who are not charged. And we submit, your Honor, that
19 the policy reasons behind that grand jury secrecy are still
04:25 20 very much in effect today.

21 Again, I know the parties have talked about *Douglas*
22 *Oil* and the standard that Saint Thomas needs to meet. We
23 respectfully submit, your Honor, that they have not met that,
24 and they haven't come close to meeting their burden to show
25 either an injustice in their proceeding, a need for the

1 disclosure or any -- clearly, they've made no request to
2 structure -- their request is only government materials that
3 they're looking for. And we submit, your Honor, that the
4 reason they don't do that is because they can't. They don't
5 exactly know what they're looking for. That's why we say in
6 our brief we believe that this is a fishing expedition. We
7 understand that they'd like to review our memoranda of
8 interviews to decide who they should call at trial, but we
9 submit that is not making a particularized need for the
04:26 10 information.

11 They also talk about needing equal access to the
12 discovery. We point out that they're not parties to the
13 criminal case, obviously. So again, their view that they have
14 some sort of right of access to criminal discovery as to the
15 litigants, I submit, is just not persuasive. In an attempt to
16 understand this request, as I said when I began, it was not our
17 desire to intervene in this case. I've had conversations with
18 multiple counsel for the Saint Thomas Entities. And frankly,
19 we struggle at the U.S. Attorney's Office to understand why
04:27 20 they need all of this information in order to assert their
21 comparative fault claims.

22 I don't think anybody in this litigation is going to
23 dispute that NECC made contaminated drugs. And as to how that
24 drug was made or what the process was, what processes were or
25 were not followed, I don't know how much of that, if this case

1 goes to trial, is going to be allowed to come in or how much
2 the Saint Thomas Entities will decide they even want to put in,
3 but I submit, your Honor, that the relevance of a lot of this
4 material is highly in question. And we've done our best to
5 understand the request, and we struggle, too, frankly, and I've
6 let them all know that.

7 It, again, has led us to the conclusion similar to
8 what Mr. O'Hara said, that perhaps this is some sort of tactic
9 to stall their litigation.

04:27 10 Finally, a couple of other points I just wanted to
11 highlight from our brief, your Honor. Again, the threat of the
12 documents becoming public, I know Ms. Peirce says she feels
13 this is the government's battle. In many ways we feel like
14 this is the defendants' battle. 14 criminal defendants have a
15 right to a fair trial. If these documents become public --
16 there's a great national interest in this case, and if these
17 documents become public, if testimony or witness interviews
18 become public, there's no way to take that back, and there's no
19 way to rectify the harm in some ways. And so we really see a
04:28 20 very real threat to the criminal case and the integrity of the
21 criminal process which, as you know, your Honor, is set to go
22 to trial in April.

23 Again, vast amounts of the discovery material are not
24 relevant, even assuming that they were to be allowed to
25 introduce evidence in their trial about how the methyl pred was

1 made. A lot happened in this investigation between Point A and
2 Point B, and 8.8 million pages are not relevant to their
3 comparative fault claims.

4 Finally, your Honor, we just ask that you read the
5 *Moussaoui* case. We obviously have a very different view of it
6 than the Saint Thomas Entities do, particularly Part D of that
7 decision. The discovery issue in this case was not about
8 turning over non-classified, non-sensitive security information
9 as they suggest in that brief. It was about the policy reasons
04:29 10 behind not allowing criminal discovery to go to civil litigants
11 before criminal cases are tried. There's very strong policy
12 argument against it as set forth in the brief, and it's the
13 very same situation we're facing here, your Honor.

14 So for those reasons, unless you have any questions,
15 we'd ask that you oppose their -- deny their motion to compel.

16 THE COURT: Thank you. Does anyone from the PSC wish
17 to speak?

18 MS. JOHNSON: Thank you, your Honor.

19 Briefly, your Honor, the PSC did not initially take a
04:29 20 position on this matter, feeling it was adequately briefed by
21 both sides and that the Court would ultimately decide. After
22 the U.S. Attorney's Office moved to intervene, we looked at
23 this issue again, and I do want to share with the Court PSC's
24 viewpoint.

25 We think that these materials are not needed by the

1 Tennessee defendants for two different reasons. First, as this
2 Court is well aware, there's a choice of law decision pending
3 before -- I believe formally before Judge Zobel but before this
4 Court. Depending on how that choice of law decision comes out,
5 if the court, in fact, chooses to apply Massachusetts law in
6 this context, there would be no need for comparative fault
7 discovery. And despite the Tennessee defendants' efforts to
8 articulate reasons that these documents -- these and other
9 documents, it's actually better articulated I think in the
04:30 10 motion to compel documents from NECC, but there have been
11 efforts by the Tennessee defendants to articulate other
12 allegedly non-comparative fault reasons that materials may be
13 needed, we think those fall flat here. It really does
14 ultimately come back to finger-pointing, which under Tennessee
15 law, the Tennessee defendants may have a right to do but they
16 do not under Massachusetts law. So it may be that that choice
17 of law decision functionally moots this particular area of
18 discovery.

19 Separate from that, your Honor, much discovery has
04:31 20 been produced in this case to date both by NECC as well as
21 copious documents from the various other settling defendants.
22 So when we consider the request here, we should remember the
23 materials that are available to the Tennessee defendants, which
24 include materials produced by Unifirst, Liberty, ARL, all of
25 those other entities that relate to their dealings with NECC.

1 On top of that, there are roughly, I believe, 30 or
2 40,000 pages that were produced by NECC. And while I am sure
3 that it's not surprising to have the PSC say that the opposing
4 party doesn't need more discovery, to put some teeth to that.
5 Those documents produced by NECC and the other parties were
6 sufficient for the PSC to draft an amended master complaint
7 that articulated in detail the causes of action against NECC
8 and the insiders. Those documents and other discovery
9 materials produced to date were also sufficient for the PSC
04:32 10 with the trustee and many others to cobble together a \$200
11 million settlement.

12 Finally, your Honor, I hear Mr. Schramek say
13 repeatedly that one of the key issues in this case is they have
14 to know where the MPA was compounded. It's unclear that
15 there's any issue on that. Frankly, from the PSC's
16 perspective -- excuse me -- the documents are very, very clear
17 on where the contaminated batches of MPA were compounded. And
18 to the extent that there's any question about that in the civil
19 case, I am certain that the PSC and Tennessee defendants can
04:32 20 work out that particular issue. Thank you.

21 THE COURT: Thank you. Does anyone else wish to speak
22 on this?

23 All right. I will take it under advisement. Thank
24 you very much.

25 (Proceedings adjourned at 4:32 p.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, Kelly Mortellite, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 15h day of September, 2015.

/s/ Kelly Mortellite

Kelly Mortellite, RMR, CRR

Official Court Reporter

10:33